IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.812 OF 2000

Jhonson Danial Disoza
Prisoner No.C-11606,
At present Yeravada Central
Prison, Yeravada, Tilak Yard,
Pune-411 006. .. Appellant.

v/s.

The State of Maharashtra
At the instance of Kothrud
Police Station, Pune. .. Respondent.

Ms.Smita R. Gaidhani, advocate appointed by court for appellant.

Smt.V.R.Bhonsale, Additional Public Prosecutor for the State.

CORAM : R.M. LODHA AND
R.S. MOHITE, JJ.

DATED : 4th March, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

This appeal depicts lack of interest in some of the court appointed advocates even in appearing before the court. We find from the proceedings that the accused preferred this appeal through jail. Since the accused did not engage any advocate on his own to represent him in this criminal appeal, the Division Bench of this court appointed Ms.Rajeshree Kakkanwar, advocate as amicus curiae. The present Criminal appeal was called out yesterday for hearing but since the amicus curiae did not appear we adjourned the hearing of the appeal for today. Ms.Rajeshree Kakkanwar is not present today as well.

In the circumstances, we are constrained to direct the Registry to strike off the name of Ms.Rajeshree Kakkanwar from the panel of amicus curiae. We asked the Court Sheristedar to call one of the advocates from amongst the panel. Ms.Smita R. Gaidhani, advocate appeared. She expressed her willingness to prepare the case immediately. We, accordingly, appointed her to represent the appellant. The appeal was heard then with her assistance and the assistance of APP.

2. Jhonson Daniel Disoza (the accused) is the appellant before us. He faced trial for the offences punishable under sections 302 and 201 of the IPC for having committed murder of one Balu Dattu Sathe. The XIth Additional Sessions Judge, Pune vide his judgment delivered on 21.9.2000 convicted the accused of the offence punishable under section 302 IPC and sentenced him to undergo life imprisonment and pay a fine of Rs.1000/- and in default rigorous imprisonment for three months. The accused was also sentenced to undergo rigorous imprisonment for one year and pay a fine of Rs.500/- and in default rigorous imprisonment for one month for the offence punishable under section 201 IPC. Against his conviction and sentence, the appellant is in appeal before us.

3. The prosecution case unfolded during the trial

may be briefly summarised thus-

On 13.5.1999 at about noon time Balu (since deceased) and his two brothers Sandip (PW9) and Ankush had gone to Mula river for bath. The accused at that time was washing his clothes in the river. Sandip asked Balu whether he had soap with him to which Balu's reply was in the negative. Balu then left for his house to fetch the soap. The accused accompanied him. Balu did not return for quite some time. Sandip and Ankush having waited for an hour or so left for their house. They found their house locked.

Sandip and Ankush went here and there to trace Balu but all efforts were in vain. Dattu (PW10 and father of the deceased Balu) came home in the evening. He entered the house after breaking open the lock. He was informed that Balu was missing. Dattu also went for search of Balu but in vain.

At about 08.00 p.m. on 13.5.1999, Vishwas Khananvilkar, Barate, Girish Shelar (PW3) and Ashok Kshirsagar reported to Warje Police Chowky that one dead body was lying in Mutha river near Taphodham, Wardha Ashram at Warje. On the basis of the information received by these four persons, Police Inspector Namdeo Ganuji Ubale (PW4) reported to Kothrud Police Station and entry was made in the

station diary. An accidental death case was registered. The inquest of the dead body was conducted and the dead body was sent for postmortem. Dr.Prashant Narayan Patil (PW8) conducted the postmortem of that dead body. On external examination, he found one contusion over left occipital region which was ante-mortem. In his opinion, the cause of death was asphyxia due to drowning. That the dead body was that of Balu was identified by his father Dattu (PW10) and cousin Suresh (PW5). The present accused while he was in custody in connection with crime No.173/99 is said to have confessed about having killed Balu and made disclosure statement that led to discovery of Balu's clothes. The Investigating Officer seized the articles under the discovery panchanama in the presence of Tukaram Tonape (PW2) and Vasant Palaskar (PW1). The seized clothes were sent for chemical analysis. The Investigating Officer recorded the statements and upon conclusion of the investigation, submitted the chargesheet in the court of Judicial Magistrate, First Class (A.C.), Pune. The case was then committed to the Court of Sessions.

4. The prosecution examined 12 witnesses in all.

5. Vasant Waghoji Palaskar (PW1) is the witness to memorandum of panchanama as well as inquest panchanama.

6. Tukaram Laxman Tonape (PW2) is also witness to the discovery panchanama.

7. Girish Tukaram Shelar (PW3) is the witness who reported about the dead body to Warje Police Chowky on 13.5.1999.

8. Namdeo Ganuji Ubale (PW4) at the relevant time was posted as Police Sub Inspector, Kothrud and having come to know from PW3 that the body was lying in Mutha river near Taphodham Society, he went to the spot, prepared inquest panchanama and sent the dead body to the Sassoon Hospital for postmortem.

9. Suresh Bhimrao Sathe (PW5) is the real cousin of deceased Balu. He is witness to the identification of the dead body.

10. Uttam Patalu Kalekar (PW6) is the fisherman by profession. On 13.5.1999 in the morning he went to Mutha river for fishing. At about 02.00 p.m. he found the accused and Balu quarrelling under the influence of alcohol. Both of them were known to him. All of them hailed from the same locality. He saw the accused giving stone blow on the head of Balu. The accused then dragged Balu towards the river bank. PW6 stated that having seen that he got

frightened and ran towards his house.

11. Ramesh Ganpat Mane (PW7) testified before the court that on 13.5.1999 at about 3.30 p.m. the accused met him. He found accused under the influence of alcohol.

12. Dr.Prashant Narayan Patil (PW8) was the Medical Officer, Sassoon General Hospital, Pune at the relevant time. In the midnight of 13th May, 1999, according to him, the dead body of one unknown male was brought to him for postmortem examination by PSI, Kothrud Police Station. He performed postmortem between 11.40 p.m. (13th May, 1999) to 12.10 a.m. (14th May, 1999). He found contusion over left occipital region about 3x2 cm. on external examination of the dead body. It was ante-mortem. On internal examination, he found that there was haematoma over right frontal region 2x1 cm. and over left occipital region 4x3 c.m. In his opinion, cause of death was asphyxia due to drowning. He proved the postmortem notes of the dead body prepared by him.

13. Sandip Dattu Sathe (PW9) is the younger brother of deceased Balu. According to him, on 13.5.1999 in the noon time, he alongwith his two brothers Ankush and Balu went to Mula river for bath. The accused was washing his clothes. He wanted soap from Balu

but since Balu did not have the soap, he left for the house to fetch the soap. The accused accompanied him. Balu did not return for quite some time. Then he alongwith his brother Ankush left for their house. Their house was locked. They tried to trace out the deceased but failed. In the evening their father (PW10) arrived, broke open the lock and they entered the house.

14. Dattu Rambhau Sathe (PW10) is the father of the deceased Balu and Sandip (PW9). He deposed that he tried to search his son on 13.05.1999 but failed. Then he went to Warje Police Chowky. Police sent him to Morgue of Sassoon Hospital for identifying the dead body. He found that the dead body was that of Balu.

15. Mohammed Chand Mulani (PW11) testified in respect of the investigation conducted by him.

16. Ramesh Ganpatrao Galande (PW12) is also the police officer. At the relevant time, he was incharge of Warje Police Chowky. He testified that the accused was arrested in one dacoity case being C.R.No.173/99 and during the course of investigation of that case, he confessed about the murder of Balu The accused was arrested on 16.5.1999. He lodged complaint (Exhibit 36) on 25.5.1999.

17. Having surveyed the evidence, we find that the conviction of the accused for the offence punishable under section 302 IPC cannot be safely maintained. PW6 is the most material witness. His deposition establishes (one) That on 13.5.1999 at about 02.00 p.m. he was near Mutha river (two) That he knew the accused and the deceased Balu as both of them hailed from same locality (three) That the accused and the deceased were under the influence of alcohol and quarrelling (four) That the accused gave stone blow on the head of the deceased and (five) That the accused dragged the deceased towards the river bank His deposition does not carry the case against the accused further. The presence of PW6 at the site is not unnatural. He is the fisherman by profession. He had gone to Mula river for the fishing purposes in the morning and remained there until afternoon. The testimony of PW6, if accepted as it is, shows that under the influence of alcohol, both the accused as well as the deceased quarrelled and that the accused gave a stone blow on the head of the deceased and then dragged the deceased towards the river bank. PW8 is the Medical Officer who conducted the postmortem of the dead body. The evidence of PW6 that the accused gave one stone blow to the deceased is corroborated by the evidence of PW8. On external examination PW8 found one contusion over the left occipital region of about 3x2 cm. on the dead body. The said injury was

ante-mortem. In the opinion of PW8 the cause of death was asphyxia due to drowning. He does not state a word that the injury caused by the accused on the left occipital region was the cause of death or was sufficient in the ordinary course of nature to cause death. The cause of death has been identified as asphyxia due to drowning. PW6 does not say that the accused threw the deceased in the river. The deceased was drunk. He had consumed liquor. The possibility cannot be ruled out that under the influence of alcohol the accused might have fallen in the river after the accused pelted stone at him and dragged him near the river bank.

The benefit, therefore, must go to the accused.

18. The learned Additional Public Prosecutor submitted that the clothes (pant and shirt) of the deceased Balu were recovered at the instance of the accused. We reflected over this aspect. In so far as memorandum Exhibit 11 is concerned, PW1 admitted in his cross-examination that the accused did not put signature on the memorandum in his presence. PW2 who is the witness to discovery memorandum cannot be safely relied upon being a police constable. Moreover the recovery has been made from the place which is accessible to all. The clothes were found at the distance of 150 ft. from the place of incident and were hanging on the bushes. According to PW6, the blood was oozing from the

wound sustained by Balu and had fallen on his clothes but the said clothes were not sent for chemical analysis. The recovery of clothes, thus, suffers from serious flaw. The evidence relating to the recovery of other articles is no better.

19. All in all, we find that from the evidence of PW6 and the circumstantial evidence relied upon by the prosecution, the offence under section 302 IPC is not established against the accused beyond reasonable doubt. Though the accused can be held guilty of having caused hurt to Balu.

20. In so far as the conviction of the accused for the offence punishable under section 201 IPC is concerned, the learned Additional Public Prosecutor could not indicate any evidence from the record that could bear out the offence u/s.201 IPC. The finding of the trial court that the accused threw the dead body in water is based on surmises and conjectures. The prosecution case that the clothes of the deceased were seized from the bushes near the river on the disclosure statement of the accused falsifies that the accused caused disappearance of the evidence. The evidence on record does not prove the offence under section 201 IPC against the accused.

21. In the result, the appeal is allowed. The judgment dated 21.9.2000 passed by XIth Additional

Sessions Judge, Pune in sessions case 438/99 cannot stand and accordingly the conviction of the accused under sections 302 and 201 IPC is set aside. The accused, however, is convicted of the offence punishable under section 323 IPC and is sentenced to suffer R.I. for one year with a fine of Rs.1000/- and in default to suffer R.I. for three months. The accused shall be entitled to set off in accordance with law.

(R.M. LODHA, J.)

(R.S. MOHITE, J.)